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COURT OF APPEALS
DIVISION II

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No. 37698-9-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JIM G. GROVE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 07-1-00878-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Grove was entitled to a voluntary intoxication jury instruction regarding the second degree theft charge.

2. Whether defense counsel was ineffective for failing to propose a voluntary intoxication instruction regarding the bail jumping charge.

3. Whether the State presented sufficient evidence to support convictions for theft in the second degree and bail jumping.

B. STATEMENT OF THE CASE.

1. Facts.

On May 6, 2007, Sandra Armstrong was at the Red Wind Casino. While playing a slot machine, she needed additional cash and went to an automated teller machine (ATM) located approximately eight to ten feet away. [RP 8-10] Because she didn't want to lose her slot machine, she paced back and forth between it and the ATM while waiting for the \$500 she requested to be dispensed. The ATM was located on the wall in an area where people walked through when moving about the casino. [RP 11] While she was approximately six feet from the ATM she observed a man walk past the ATM, between her and the machine, and saw his hands move toward his pocket. [RP 11-12] When she arrived at the ATM the cash was gone, and the receipt had not yet printed out. After getting the receipt, she reported the loss to casino

personnel. [RP 12-13, 17] She did not get a good look at the man who took the money, and could not identify the defendant in court.

[RP 20]

Robin Pelekai, a Nisqually Tribal Gaming Agent, was working at the casino that day and was responsible for the preliminary investigation. [RP 25-26] She immediately reviewed footage from the casino security cameras, specifically the one that recorded activity at the ATM. [RP 29] The film showed a man taking the money and walking away, and after seeing that film she identified Grove on the casino floor as the man in the video and took him to the front security office. [RP 30] The security office contained audio-visual recording equipment that recorded activity in that office. [RP 30]

Film from other security cameras showed Grove, following the theft of the cash from the ATM, putting one or more \$100 bills into a cash exchange terminal (CET), a machine that takes paper money and produces tickets which the purchaser can then use in the slot machines. [RP 37-38, 44] Grove later made a second visit to the CET, obtaining more tickets. [RP 38, 43]

After escorting Grove to the security office, Pelekai briefly left the office to photocopy his identification. [RP 33] The video from

that time showed that while he was alone, Grove took something from his pants pocket and stuffed it into his shoe or sock. [RP 40] Pelekai questioned Grove about the theft, but he denied taking any money. [RP 34] He claimed that he had conducted a transaction at the ATM, although the video showed that he did not. [RP 41] Pelekai noted no odor of alcohol about Grove, nor any signs of medical distress. He was friendly and answered questions. [RP 42]. Officers from Nisqually Police Department were summoned, but because Grove was not a tribal member, they determined that the Thurston County Sheriff's Office had jurisdiction. [RP 34]

Thurston County Deputy J. R. Klene responded to the casino, viewed the video, and contacted Grove. The deputy read Grove his *Miranda* warnings and questioned him. [RP 47-49] Again Grove denied stealing anything. [RP 53] When asked about the item transferred from his pocket to his sock, he did not respond. [RP 54] Grove was searched, and was found to have \$154, including one \$100 bill, on his person. [RP54-55] He also had a cash exchange ticket worth \$80. [RP 61]. Klene testified that Grove was coherent, responded to questions without confusion, and asked if he could return the money he had to the victim and write her a check for the remainder. That offer was refused. [RP 57-58]

Grove did not mention anything about a wife or girlfriend being at the casino with him. [RP 63]

An Information was filed on May 16, 2007, charging Grove with second degree theft. [CP 3] There were numerous pretrial hearings, and on November 14, 2007, an order was entered setting an omnibus hearing for December 19, 2007, a status conference for January 23, 2008, and trial for January 28, 2008. Grove signed this order. [RP 74, Exhibit 7] Grove failed to appear on January 23, 2008, and a bench warrant was ordered. [RP 77, Exhibit 6] The warrant was filed January 28, 2008, [RP 79, Exhibit 5] and a sheriff's return of service, filed on February 12, 2008, showed that the warrant had been served on February 7, 2008. [RP 79-81]

Grove testified at trial. He said that he had arrived at the Red Wind Casino between 11:00 a.m. and 1:00 p.m. on May 6, 2007. (He later said he'd been there since 9:00 a.m. [RP 115]) He went to the casino because his back hurt too much for him to go to the plumbing job he had lined up for the afternoon. [RP 97] He took with him between \$300 and \$400 he had earned, and had used the ATM to obtain more cash. [RP 98] He also said that he had won \$300 and had cashed in the winning ticket. [RP 120] He thought his long-time girlfriend, Cindy, was with him, but he was actually alone.

[RP 98-99, 101, 106,122] He said he had taken a 300 or 500 mg Percocet about 3:00 o'clock that morning, half of a 500 mg. Vicodin about 7:30 a.m., and another Percocet just before the incident, around 2:30 to 3:30 p.m. [RP 99-100, 102, 105]

Grove further testified that he had been to the restroom and was walking past the ATM on his way back to his slot machine. [RP 114] He saw the cash sticking out of the ATM, took it, and returned directly to his slot machine, intending to return the money to the rightful owner. [RP 101, 114] He stuck the money into his pocket, but did not contact security. He figured somebody from security would walk past his machine and he'd tell that person about the money, but he didn't see any security personnel until he was contacted in the security office. [RP 102-103] He said that on the way to the office he had informed security that he had been looking for them to tell them he found the money. [RP 116] He did not tell Pelekai about the money because she didn't ask him about it "right off the bat." [RP 104] He did not know how much cash he had picked up at the ATM and only later realized that he must have spent some of it purchasing tickets at the CET. [RP 104]

When asked what he had transferred from his pocket to his sock in the security office, he explained that it was a coin his

grandfather had given him when he was eight or nine years old, and at that time he'd promised his grandfather he would never steal. Now that he was accused of stealing something, he took the coin from his pocket and put it into his sock. [RP 105]

Grove further testified that he was not aware of his court date on January 23, and that the paperwork had burned in a house fire on December 22, 2007. [RP 109] He did not remember signing the notice, and blamed his heart condition for his lack of awareness. [RP 110] He claimed that his medications had affected his memory and his perceptions on May 6, 2007, [RP 97, 101], but that he had always intended to return the money to the rightful owner. [RP 101, 103, 106, 114]

2. Procedure.

A First Amended Information was filed on January 24, 2008, charging second degree theft and bail jumping. A jury trial was held on April 23 and 24, 2008. Grove was convicted of both charges. [CP 16, 17]

C. ARGUMENT.

1. Grove was not entitled to a jury instruction on voluntary intoxication, and therefore it was not error for the court to refuse to give it.

The voluntary intoxication instruction, WPIC 18.10, reads as follows:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with [the required mental state].

This court reviews a trial court's decision to reject a party's jury instruction for abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998) (citing State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997), *review denied*, 135 Wn.2d 1002, 959 P.2d 127 (1998)). Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. Pesta, *supra*, at 524 (citing Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 194, 668 P.2d 571 (1983)).

To be entitled to a voluntary intoxication instruction, Grove had the burden of proving that (1) the charged crime contained an element of a particular mental state; (2) there was substantial evidence of his drug consumption; and (3) the consumption of drugs affected his ability to possess the required mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996).

"A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious." Gabryschak, *supra*, at 254 (citing State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987)). If evidence is sufficient to permit the jury to conclude that the intoxication affected the defendant's ability to acquire the requisite mental state, it is reversible error for the trial court to refuse to give the instruction. State v. Gallegos, 65 Wn. App. 230, 239, 828 P.2d 37, *review denied*, 119 Wn.2d 1024, 838 P.2d 690 (1992).

However, if the evidence is lacking, a trial court properly refuses to give the instruction. State v. Finley, 97 Wn. App. 129, 982 P.2d 681 (1999), *review denied* 139 Wn.2d 1027, 994 P.2d 845 (2000). Evidence of drug use does not alone warrant an intoxication instruction. Gabryschak, *supra*, at 253. The evidence must reasonably and logically have connected Grove's intoxication with his inability to form the requisite mental state, demonstrating the effects of the alcohol on his mind or body. Gabryschak, *supra*, at 252-53. This was not the case here. Grove testified at least four separate times that he intended to return the money to the rightful owner. [RP 101, 103, 106, 114] If he could form the intent to return the money, he could have formed the intent to deprive the rightful

owner of the property. [Instructions 8 and 9, CP 61] Further, both the tribal gaming agent and the deputy sheriff testified that they noticed no signs of intoxication. [RP 42, 57]

Many criminal acts follow the use of alcohol or drugs. Finley, *supra*, at 135, citing Montana v. Egelhoff, 518 U.S. 37, 49, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996). However, nothing here reasonably and logically connects Grove alleged intoxication with an inability to form the necessary mental states for the crime of second degree theft. See Finley, *supra*, at 135-36. Contrary to Grove's assertion, the trial court is required to weigh the evidence and find some minimum quantity before allowing the involuntary intoxication instruction. The trial court did not abuse its discretion in refusing to so instruct the jury. Gabryschak, *supra*, at 252-53.

2. Grove's counsel was not ineffective for failing to propose a voluntary intoxication instruction on the bail jumping charge.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d

668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient

that he was deprived “counsel” for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

For all the reasons discussed above, there was no evidence that any drug use affected Grove’s ability to form intent, and therefore even had defense counsel proposed a voluntary intoxication instruction, the court would have refused to give it, and the court would have been correct.

Grove was convicted of bail jumping under RCW 9A.76.170, which reads:

Bail jumping. (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

“Knowledge” is the only mental state that the State is required to prove. “[T]he knowledge requirement is met when the State proves that the defendant has been given notice of the

required court dates.” State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004), *citing to* State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004); *see also* State v. Ball, 97 Wn. App. 534, 537, 987 P.2d 632 (1999). Knowledge of the obligation to appear can be inferred if a reasonable person would have known that the hearing was scheduled. State v. Bryant, 89 Wn. App. 857, 871, 950 P.2d 1004 (1998). The State is not required to prove that Grove knew on each and every day following his notice that he was to be in court on January 23rd. “. . . ‘I forgot’ is not a defense to the crime of bail jumping.” Carver, *supra*, at 306. By analogy, “I was too medicated to remember” is not a defense either, nor can it be couched as a failure of the State to prove intent. Because intent is not an issue in bail jumping, a voluntary intoxication instruction would not be appropriate. If there is no intent at issue, the inability to form an intent is not before the jury.

Defense counsel was not ineffective for failing to seek such an instruction regarding the bail jumping charge.

3. The State produced sufficient evidence to support the convictions for both second degree theft and bail jumping.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier

of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d

850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

To prove second degree theft, the State was required to prove that Grove wrongfully obtained or exerted unauthorized control over the property of another, that the value of the property exceeded \$250, and that he intended to deprive the rightful owner of the property. [Instructions 8, 9, 10, CP 61-62] Grove does not dispute that he took the \$500 in cash from the ATM, only that he had the intent to deprive the owner of her property. He testified that he planned to return the money to the rightful owner. The jury was not required to believe that testimony, particularly in light of the circumstantial evidence of his intent, which is as reliable as direct evidence and from which intent can be inferred.

The jury heard that Grove took the money from the ATM as he walked past, and put it in his pocket immediately. [RP 11-12, 102] The incident spanned a time of only three to four seconds. [RP

113] By his own testimony, he returned to his slot machine, and although he claimed he asked the person next to him what to do, [RP 101], the evidence is that he did not contact security or any other person about returning the money. Twice he was captured on video putting money into the CET to buy tickets to use in the slot machines. [RP 37, 38] The money he was using was clearly one or more \$100 bills. [RP 41] By the time he was contacted and taken to the security office, approximately sixteen minutes after taking the money, [RP 115], he had done nothing to return the money, but in fact had spent most of it. When searched later, he had only \$154 on his person. [RP 55] When talking to casino security personnel and the deputy sheriff, he denied taking the money, [RP 33, 53] and claimed that he had used the ATM to obtain his own cash, although the video showed that he had not. [RP 41]

The jury also had Grove's testimony to consider. While a defendant has the right to remain silent, when he chooses to give up that right and take the stand, his testimony is subjected to the same scrutiny as any other witness's. Grove's made no sense at all. He blamed his medications for the fact that his behavior was inconsistent with his stated intent, but the evidence was that he showed no manifestation of any intoxication.

Viewing all of the evidence in the light most favorable to the State, there was ample evidence to support the conviction for second degree theft. Even viewing the evidence in a light favorable to the defendant, there was more than enough evidence to support the conviction.

The bail jumping statute is set forth in the previous section. As noted, the State had only to prove that Grove received notice and that he failed to appear for a hearing on January 23, 2008. The State's exhibits 5, 6, and 7 proved that. While on the stand Grove claimed not to know that he had a court date on the 23rd, that his paperwork had burned up in a house fire, and that he had been ill, the evidence was that he signed the order requiring his appearance and that he did not appear on January 23rd. Contrary to his assertion, the State was not required to prove that he 'knowingly' failed to appear. See Carver and Ball, *supra*. There was more than sufficient evidence to support Grove's conviction for bail jumping.

D. CONCLUSION

The trial court was correct in refusing to give the voluntary intoxication jury instruction regarding the second degree theft charge. Defense counsel was not ineffective for failing to request that instruction regarding the charge of bail jumping. There was

sufficient evidence presented to allow a rational trier of fact to find Grove guilty of both charges. The State respectfully asks this court to affirm both convictions.

Respectfully submitted this 4th day of December, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent No. 37698-9-II, on all parties or their counsel of record on the date below as follows:

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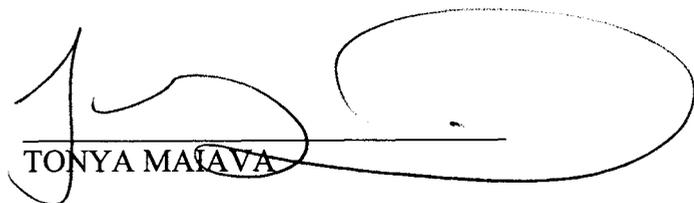
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of December, 2008, at Olympia, Washington.



TONYA MATAVA